IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-000243
[2020] NZHC 2831

UNDER		the Land Transfer Act 2017
BETWEEN		MELCO PROPERTY HOLDINGS (NZ) 2012 LIMITED Applicant
AND		ANTHONY JOHN HALL Respondent

Hearing:	13 October 2020 27 October 2020 (teleconference)
Appearances:	F B Collins and J M Perry for Applicant S M O'Sullivan and T Cunningham for Respondent
Judgment:	29 October 2020

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 29 October 2020 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] The applicant (Melco) seeks an order under s 143 Land Transfer Act 2017 that a caveat lodged by it over the title to a property at 5 Parliament Street, Lower Hutt owned by the respondent (Mr Hall) not lapse.

[2] Melco asserts it has a caveatable interest in the property as purchaser under an agreement for sale and purchase between it and Mr Hall dated 6 December 2019 (the agreement).

[3] Mr Hall argues Melco does not have a caveatable interest in the property as the agreement has been cancelled following Melco's failure to confirm a due diligence condition.

[4] At issue is whether Mr Hall was unable to avoid the agreement because Melco's failure to satisfy the due diligence condition was due to Mr Hall's default under the agreement in:

(a) failing to allow Melco access to the property to complete due diligence; or

(b) failing to advise Melco he did not intend to grant an extension of time for fulfilment of the due diligence condition.

The facts

[5] Melco carries on business under the name Black Diamond Technologies Ltd (BDT) from premises at 1 and 3 Parliament Street, Lower Hutt. It wishes to acquire Mr Hall's property to expand its operations. Melco expressed interest in purchasing the property using the services of an agent, Kevin Dee of Gollins Commercial Ltd. The negotiations resulted in the parties entering into the agreement.

[6] The agreement is in the REINZ/ADLS Ninth Edition 2012(8) form. Melco agreed to pay $1,500,000 plus GST (if any) for the property. A deposit of $100,000

was payable on the agreement becoming unconditional. The settlement date was 1 February 2020.

[7] The agreement was subject to a special condition cl 19, in these terms:

> 19.0 **Due Diligence**
>
> 19.1 This agreement is subject to and conditional upon the Purchaser being satisfied that the property is suitable for the Purchaser's requirements following the Purchaser carrying out due diligent verification of the property, including by way of example and without limitation;
>
> (a) the value and condition of the property;
>
> (b) the terms of all encumbrances, rights and interests registered against the property;
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> (c) the terms and implications of the zoning or permitted use related aspects of the property and any statutory protection notices or designations on the property;
>
> (d) compliance schedule requirements under the Building Act 2004;
>
> (e) the overall financial suitability of the Purchaser's proposed investment in the property, their ability to obtain necessary finance to complete the purchase and financial suitability of the tenant(s).
>
> 19.2 The Vendor shall provide the Purchaser upon request with such information (except insofar as the vendor is legally bound to keep such information confidential) which the Vendor has in respect of the property in order to assist the Purchaser to fulfil this condition.
>
> 19.3 The date of fulfilment is fifteen (15) working days following execution of this agreement.
>
> 19.4 The parties acknowledge that the conditions in clause 19.1 are inserted for the sole benefit of the Purchaser and at any time prior to this agreement being avoided may be waived by the Purchaser giving written notice of waiver to the Vendor.

[8] It is common ground the date for fulfilment of cl 19 was agreed to be 9 January 2020.

[9] Relevant also is cl 10.8 which provides:

> 10.8 If this agreement is expressed to be subject either to the above or to any other condition(s), then in relation to each such condition the following shall apply unless otherwise expressly provided:
>
> (1) The condition shall be a condition subsequent.

(2) The party or parties for whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment.

(3) Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.

(4) The condition shall be deemed to be not fulfilled until notice of fulfilment has been served by one party on the other party.

(5) If the condition is not fulfilled by the date for fulfilment, either party may at any time before the condition is fulfilled or waived avoid this agreement by giving notice to the other. Upon avoidance of this agreement, the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid by the purchaser under this agreement and neither party shall have any right or claim against the other arising from this agreement or its termination.

(6) At any time before this agreement is avoided, the purchaser may waive any finance condition and either party may waive any other condition which is for the sole benefit of that party. Any waiver shall be by notice.

[10] In an email of 12 December 2019, John Ellison, an Operations Manager, wrote to Mr Dee on behalf of Melco asking if there was an earthquake report and/or a building report available for the property. Mr Dee forwarded Mr Ellison's email to Mr Hall with his recollection Mr Hall had advised him he did not have these reports. Mr Dee's email to Mr Hall was copied to Mr Ellison.

[11] Mr Hall gave Melco access to the property on both 16 and 17 December 2019.

[12] During Melco's inspection on 16 December 2019, Mr Hall confirmed he did not have reports on the building. Later that day, Melco engaged Silvester Clark, a structural engineering firm, to do a seismic assessment of the building.

[13] Melco's builder and roofer inspected the property on 17 December 2019.

[14] On 23 December 2019, Silvester Clark advised Melco that it would not be able to do a physical assessment of the building until the week of 13 January 2020 with a view to completing a report by 17 January 2020. In an email that day, Mr Ellison asked Mr Dee to talk to Mr Hall to see if it would be possible to extend the due diligence deadline to 17 January 2020.

[15] On 24 December 2019, Mr Dee sent Mr Hall an email requesting an extension of the due diligence condition to 17 January 2020. On 26 December 2019, Mr Hall responded that he did not see any issues concerning the request but he would discuss any changes to the agreement with his solicitor, Paul May, in the New Year. Mr May was expected to return to work on 9 January 2020.

[16] On 6 January 2020, Melco, concerned about the expiry of the due diligence condition, decided to engage a second structural engineer, EQ Struc Ltd (EQSTRUC) to prepare a report on the property.

[17] On 7 January 2020, Mr Hall travelled for a camping trip in the Tararua Ranges, where there is apparently limited cellphone coverage. That day, at 8.06 am Melco's Operations Support Coordinator, Jessica Isaacs, sent Mr Hall a text asking for the keys or access to the property.

[18] In an email at 1.24 pm on 7 January 2020, Ms Isaacs advised Alden Balili of EQSTRUC that she had spoken to her manager and asked if it would be possible for EQSTRUC to provide their report "prior to 10am on Friday as the deposit is due on Friday – this way he should have enough time to review your findings." The Friday she refers to was 10 January 2020 which was after the due diligence condition expired. Mr Balili responded at 2.04 pm that: "If we can start tomorrow that is possible." Ms Isaacs emailed Mr Balili again at 3.27 pm and wrote: "Awesome, thank you! Still trying to get through to get an answer on the whereabouts of the key."

[19] During the afternoon of 7 January 2020, Mr Hall spoke to both Mr Dee and Ms Isaacs and said he would get back to them the next day as to whether he could give Melco access to the property. Later that day, Mr Hall sent a text to Ms Isaacs that he would be in Wellington on 9 January 2020 and would speak to Mr May about Melco's request for an extension of the due diligence condition.

[20] Early on 8 January 2020, Mr Hall sent Ms Isaacs a text that he would provide access to the property if Melco's engineer was available. It was arranged that Mr Hall would meet Ms Isaacs and Mr Balili at the property at 12 pm that day. At 10.22 am, Mr Hall sent a text to Ms Isaacs that due to an unforeseen delay he would need to

postpone the meeting. Mr Hall says this was because he realised he had told friends he would be returning to his campsite and was unable to contact them to tell them of his changed plans.

[21] Mr Hall says he then received a telephone call from a person who had heard the property was on the market. This caused him to reflect on his decision to sell the property.

[22] At 6.10 am on 9 January 2020, Melco's solicitor sent an email to Mr May requesting an extension of the due diligence condition to 17 January 2020. Mr May forwarded this email to Mr Hall. Mr Hall instructed Mr May he was not to respond to the request and was to cancel the agreement as soon as he was able to do so.

[23] During the morning on 9 January 2020, Melco received a preliminary seismic report on the property prepared by Silvester Clark. It indicated concerns and an inspection of the building was required but Silvester Clark could not carry out an inspection until the following week.

[24] Later that day, Melco's solicitor telephoned the office of Mr May seeking an answer to the request for an extension of the due diligence condition. Mr May did not return the call.

[25] Melco neither confirmed nor waived the due diligence condition.

[26] At 5.03 pm, Mr May sent by email a letter to Melco's solicitor purporting to cancel the agreement on the basis that Melco had failed to confirm the due diligence condition.

[27] Melco did not accept the cancellation of the agreement. Its solicitor wrote to Mr May on 10 January 2020 that it would enforce its rights under the agreement.

[28] On 16 January 2020, Melco lodged its caveat.

[29] In a letter to Mr May of 24 January 2020, Melco's solicitor purported to waive the due diligence condition. The letter stated Melco regarded the agreement as

unconditional and was willing to commence proceedings for specific performance of the agreement.

[30] On 23 January 2020, Mr Hall entered into an agreement with a third party to sell the property for $1,600,000. That agreement was conditional upon Melco removing its caveat and as Melco did not do so the agreement came to an end.

The caveat and legal principles

[31] The principles upon which this application is to be determined are set out in *Philpott v Noble Investments Ltd*, where the Court of Appeal noted the following:[1]

> [26] The applicable legal principles which governed the application to sustain the caveats, and which now govern this appeal, are as follows:
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> (a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;
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> (b) It is enough if the applicants put forward a reasonably arguable case to support the interest they claim;
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> (c) The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained — either because there is no valid ground for lodging it in the first place, or because such a ground no longer exists; and
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> (d) When an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's legitimate interest would not be prejudiced by removal.

[32] Applications of this kind are not ordinarily appropriate to finally determine the rights of the parties or resolve competing interpretations of contractual terms if the factual matrix is disputed or there is not full legal argument.[2]

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1 *Philpott v Noble Investments Ltd* [2015] NZCA 342 (footnotes omitted). See to similar effect *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61, (2014) 14 NZCPR 813 at [24].

2 *Botany Land Development*, above n 1, at [23], citing *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 (CA) at 43.

[33] In *Bethell v Rickard* the Court of Appeal said:[3]

> [29] … An application for removal of a caveat is a summary procedure to determine the arguability of a claim and not its merits, which is the function of a trial. We accept that in some cases the meaning of a disputed contractual provision will be plain and it is unnecessary to resort to extraneous circumstances. If so, a removal order effectively determining the final issue may be appropriate.
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> [30] … Where a contractual provision is capable of conflicting interpretations, it will be important for the Court at trial to "be aware of … all the facts or circumstances known to and likely to be operating on the parties' minds". Ms Rickard's claim clearly falls into that category. The trial judge will need to be particularly cognisant of contextual matters relating to the family and personal circumstances affecting the parties.

The submissions

Melco's arguments

[34] Melco's case rests on assertions that:

(a) It took all reasonable steps to satisfy cl 19.

(b) There were implied terms of the agreement the parties would cooperate and that neither would prevent or delay performance of conditions of the agreement.

(c) It was an implied term of the agreement that Mr Hall was obliged to do "everything necessary" to allow it access to the property to obtain a seismic report. [4]

(d) It was an implied term of the agreement that Mr Hall would communicate to Melco his intention to not grant an extension of the due diligence condition.

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3 *Bethell v Rickard* [2013] NZCA 68 (footnotes omitted).

4 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC).

(e) Mr Hall breached these implied obligations by failing to provide access to the property when requested and not communicating his intention to refuse Melco's request for an extension of cl 19.

(f) As a result of Mr Hall's breaches, Melco could not fulfil cl 19 and was deprived of the opportunity to waive the condition. Had its engineer been given access to the property as requested it could have obtained a seismic report and confirmed the agreement. Had Mr Hall advised it he did not intend to grant an extension of time it could have elected to waive the condition.

(g) Mr Hall could not take advantage of his own breaches and avoid the agreement which remains on foot.

(h) Alternatively, that in deciding whether to grant or refuse an extension of the due diligence condition Mr Hall was exercising a unilateral discretionary contractual power which is subject to a "default rule" that such a power will not be exercised arbitrarily, capriciously or in bad faith and he acted in bad faith in failing to communicate that Melco's extension of time request was rejected before the expiry of the due diligence period.[5]

Mr Hall's arguments

[35] In response, Mr Hall argues:

(a) There were no implied terms of the agreement as Melco alleges.

(b) He was not required to provide Melco access to the property or advise it he would not grant an extension for fulfilment of cl 19.

(c) If such implied terms apply there was no breach of them. He was accommodating of Melco's circumstances allowing access without

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5 Stephen Kós "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17.

obligation to do so and communicating with Melco as best he could over the Christmas period.

(d) Melco has failed to show that he has any responsibility for its decision not to confirm or waive the due diligence condition. Melco had the ability to confirm the agreement or waive the condition but chose not to do so.

(e) Melco's submission that a "default rule" applies is conceptually incorrect. The request for an extension of time is a request to vary the terms of the agreement and is not the exercise of a unilateral contractual power.

Discussion

Matters that are not disputed

[36] There are several matters about which there does not appear to be any dispute. These include the following:

(a) Clause 19 is a condition subsequent in a binding agreement for sale and purchase.

(b) Clause 19 was to be fulfilled by 9 January 2020.

(c) Under the agreement Melco acquired an immediate equitable interest in the property entitling it to lodge a caveat to protect that interest.[6]

(d) Melco's interest was contingent pending fulfilment or waiver of cl 19 so that if the agreement was validly cancelled Melco's interest does not survive.[7]

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6 *Foreman v Hazard* [1984] 1 NZLR 586 (CA) at 594; and *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA) at 114.

7 *Bevin v Smith* [1994] 3 NZLR 648 at 665.

(e) Melco failed to satisfy cl 19 by 5 pm on 9 January 2020 and did not waive the condition.

(f) At 5.03 pm on 9 January 2020, Mr Hall gave written notice to Melco's solicitor purporting to cancel the agreement due to non-fulfilment of cl 19.

The implication of terms

[37] As a matter of law, a party to a contract will not be allowed to assert that the failure of a condition has terminated any contractual liability if the condition has only failed through that party's own default.[8]

[38] The implication of terms that parties shall cooperate and that neither will conduct themselves so as to prevent or delay performance of conditions is governed by the same principles applying to the implication of other contractual terms.

[39] In *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd*, Devlin J said:[9]

> In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but is not necessarily the most important, and it is certainly not the only matter. There are many decided cases in which it has not prevailed.
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> …
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> The formulation of the implied term in cases of this class depends, in my judgment, on the necessity for co-operation. Without co-operation the contract would lack business efficacy, and this class of case is, therefore, simply an exemplification of a general principle … It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree – to the extent that is

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8 *Firestone Tire and Rubber Company of New Zealand Ltd v Harvard Construction Ltd* (1997) 3 NZ ConvC 192,665, referring to *Hay v Laurent Construction Ltd* (1990) 1 NZ ConvC 190,387 at 190,388–190,389; and *Nopera Log House Ltd v Godsiff* [2014] NZHC 639, (2014) 15 NZCPR 144.

9 *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 at 1017–1018.

> necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done.

[40] The Supreme Court considered the principles to be applied in deciding whether or not to imply a contractual term in *Mobil Oil New Zealand Ltd v Development Auckland Ltd*.[10] The Court applied *BP Refinery,* where Lord Simon of Glaisdale said that the following five conditions must be satisfied before a term may be implied in a contract:[11]

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

Implied term to allow access

[41] Clause 19 provides that Melco's due diligence investigation could extend to matters concerning both the value and the condition of the property. The extent to which buildings on the property are earthquake prone is relevant to the condition of the property and also its value.

[42] Adopting the approach in *BP Refinery,* I am satisfied there is an arguable case for the implication of a term that Mr Hall would provide Melco with reasonable access to the property to complete its due diligence and this included obtaining an engineer's seismic report.

[43] I consider it would be known to the parties to an agreement for sale and purchase of a commercial property that a purchaser conducting due diligence would wish to obtain an assessment as to whether a building is earthquake prone. That is particularly so when the property is in an area subject to regular earthquake activity. The evidence satisfies me that to complete such a report an engineer would be engaged and would expect to undertake a physical inspection. There is no suggestion that such access might extend to interference with the structure of the building or otherwise cause any significant disruption to the use of the property. I do not see anything

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10 *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48.
11 At [79], citing *BP Refinery*, above n 6, at 283.

unreasonable or inequitable in the imposition of a term that access to the property would be given.

[44] There are cases where the courts have implied a term enabling a purchaser to have access to inspect a property where that is necessary for the fulfilment of a condition upon which the purchaser's performance depends.

[45] In *Grubb v Toomey*, it was held to be an implied term of an agreement that the vendor would permit access to a property so that a valuation could be completed as required by the purchaser's financier.[12] Slicer J considered that the implied term was necessary to make the contract work and so obvious it went without saying.[13]

[46] In *Grieve v Enge*, it was held a vendor could not cancel an agreement for non-fulfilment of a finance condition when access to the property had been refused for the purposes of the purchaser obtaining a valuation.[14] Cullinane J held:[15]

> I think that once the first defendant became aware that the bank required a valuation for finance purposes he was, in refusing to allow the valuer entry in breach of the implied term that he would not do anything to prevent the contract from being carried into effect.

[47] By way of contrast, in *Mediratta v Clark* it was held that there was no implied term in a contract for the sale and purchase of land that the purchaser would be given access to the property shortly before settlement in order to obtain a valuation for finance.[16] The Court distinguished *Grubb v Toomey* and *Grieve v Enge* because the contract was not conditional upon the purchaser obtaining finance.[17] The Court recognised, however, that:[18]

> Where the contract is subject to a condition as to finance for the benefit of the purchaser, there would usually be an obligation on the Vendor to allow the Purchaser's financier or a valuer to inspect the Property at a reasonable time well in advance of the settlement day.

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12 *Grubb v Toomey* [2003] TASSC 131, (2003) 12 Tas R 205.
13 At [26].
14 *Grieve v Enge* [2006] QSC 037, (2006) Q ConvR 54-644.
15 At [60].
16 *Mediratta v Clark* [2019] VSC 685.
17 At [57].
18 At [51].

[48] A case concerning something akin to a due diligence condition is *Connor v Roberts*.[19] There a contract for the sale of shares and stock of a company was conditional upon the purchasers being satisfied the company had no liabilities that would diminish its share value and that the company could give clear title to the stock. The conditions were for the benefit of the purchasers. Judge Noble considered as a matter of common sense the conditions related to matters peculiarly within the knowledge of the vendors and they therefore had an obligation to achieve their fulfilment. As the vendors had failed to provide relevant information to satisfy the purchasers that it was safe for them to proceed with the purchase, the conditions were not satisfied and the vendors could not enforce the contract.

[49] An implied term that Mr Hall would provide Melco "reasonable" access is capable of clear expression and does not contradict any express term of the agreement. I do not agree with Melco's stance that Mr Hall was required to do "everything necessary" to provide access when Melco required it. Such an open-ended obligation would be unreasonable.

[50] It is a matter of construction whether a condition is one which causes an obligation to seek fulfilment to fall on one party only or on both parties.[20] I accept that it was primarily Melco's obligation to satisfy the due diligence condition. Relying on cl 19.2, Mr O'Sullivan submitted that Mr Hall had no obligation in respect to due diligence except to provide information. I do not accept that submission. Clause 19.2 does not deal with the question of access and in my view is not inconsistent with an implied obligation that reasonable access would be provided.

[51] Here, there is a case that Mr Hall satisfied his obligation to provide Melco with reasonable access. Melco was aware by at least 12 December 2019 (and possibly earlier) that a seismic report was not available for the property. It carried out inspections on 16 and 17 December 2019 and made no request of Mr Hall to inspect again until 7 January 2020; just two days before cl 19 expired and while Mr Hall was away from Wellington. Although Mr Hall initially agreed to a further inspection he says he could not keep that appointment. Whether Mr Hall was in breach in failing to

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19 *Connor v Roberts* [2002] DCR 29 (DC).
20 *Hawker v Vickers* [1991] 1 NZLR 399 (CA) at 402 – 403.

provide access on 8 January 2020 is a matter about which there can be much argument. It is a trial issue which cannot be determined on this application.

The failure of the condition

[52] Where Melco's application miscarries is that it has failed to satisfy me there is an arguable case responsibility for its failure to confirm the due diligence condition was due to Mr Hall's default.

[53] As at 7 January 2020, when Mr Hall was asked for access, Melco had engaged two firms of engineers. Neither engineer was in a position to provide the report it required before the expiry of the due diligence condition.

[54] A case that is similar to the present, in my view, is *Nopera Log House Ltd v Godsiff*.[21] There the vendors of a property had cancelled the contract upon the failure of the purchaser to satisfy a due diligence condition. The purchaser sought to sustain a caveat over the property arguing the vendors were not entitled to cancel because of their delay in providing information required by the purchaser to make an application for consent under the Overseas Investment Act 2005. The purchaser claimed it was prevented from confirming due diligence because it could not then be certain there was sufficient time for its Overseas Investment Act application to be processed. Associate Judge Matthews accepted that as a matter of principle the vendors could not rely on a condition where non-fulfilment was caused by their default but he dismissed the application. The Judge referred to the absence of evidence that any delay by the vendors in providing information to the purchaser materially affected the prospect of consent being granted under the Overseas Investment Act.[22]

[55] I convened a teleconference with counsel on 27 October 2020 to hear further submissions in relation to this issue. Mr Collins responsibly accepts that Melco would not have received a written seismic report before 10 January 2020. However, he argues it cannot be assumed that Melco would not have confirmed or waived the due diligence condition on time had Mr Hall given access on 8 January 2020. Melco could,

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21 *Nopera Log house Ltd v Godsiff* [2014] NZHC 639; (2014)15 NZCPR 144.
22 At [38].

he submits, have obtained an oral report and, on the basis of it, either confirmed or waived the due diligence condition. This, he argues, is also a trial issue that cannot be decided on an application of this kind.

[56] I am unable to accept Mr Collins's submission. His counterfactual analysis requires for its validity upon the acceptance it is arguable that:

(a) had Melco been given access to the property on 8 January 2020 it would have requested EQSTRUC to provide an oral report prior to the expiry of the due diligence condition;

(b) that EQSTRUC would have been both able and willing to provide such a report knowing it was to be relied upon by Melco;

(c) that such a report would have been provided and satisfactory for Melco's purposes; and

(d) that Melco would have acted on such a report and confirmed (or waived) the due diligence condition prior to Mr Hall cancelling the agreement.

[57] These are matters that are not addressed in Melco's evidence. What is clear, Melco did not ask EQSTRUC to provide an oral report despite knowing its written report would not be available until 10 January 2020. There is no evidence from EQSTRUC that it would have been in a position to provide an oral report and would have done so if requested. Such a suggestion is inconsistent with Mr Balili's email to Ms Isaacs of 7 January 2020 that its report required sign-off from EQSTRUC's directors. There is no evidence about what an oral report would contain. There is no evidence, either, that Melco would upon the basis of an oral report have been prepared to confirm or waive the due diligence condition. There is, however, evidence to suggest otherwise. Ms Isaacs's email to Mr Balili of 1.24 pm on 7 January 2020 notes that her manager would need the report prior to 10 am on 10 January 2020 so that he had time to review the findings.

[58] Ms Isaacs's email of 7 January 2020 is curious for another reason. She states the report was needed by 10 am Friday "as the deposit is due on Friday". As the deposit was payable upon the satisfaction of cl 19 this suggests either she or her manager were mistaken as to when cl 19 had to be satisfied. In this regard, I note that Melco was in possession of a report from Silvester Clark indicating issues with the building and chose not to confirm or waive cl 19 despite knowing that no extension of cl 19 had been granted. I do not need to decide, however, whether Ms Isaacs or her manager were mistaken. I do not accept Mr Collins's submission because there is no satisfactory evidence to support it.

Failure to communicate

[59] Melco submits that Mr Hall's failure to communicate he would not grant an extension of cl 19 deprived Melco of the opportunity to waive the condition. I do not accept this argument.

[60] There was no obligation upon Mr Hall to advise Melco he would not extend cl 19. He had no express obligation to do so under the agreement and an obligation to do so cannot be implied. It is not necessary to make the agreement work nor is it so obvious it goes without saying. To imply such a term would require Mr Hall to prefer the commercial interests of Melco in the performance of the agreement to the detriment of his own interests in bringing it to an end and that cannot be correct.

The default rule

[61] I do not accept the submission, either, that in deciding not to grant an extension of cl 19 or in failing to communicate that decision Mr Hall was subject to the default rule. Mr Hall was not exercising a unilateral contractual power. Clause 19 could only be extended by agreement of both parties. Even if a default rule applied, it did not require Mr Hall to sacrifice his own commercial interest for those of Melco.[23] An agreement for the sale and purchase of land is not a contract requiring good faith.[24]

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23 Stephen Kós "Constraints on the Exercise of Contractual Powers", above n 5, at 30.

24 *Chan v Ng* HC Auckland CIV-2007-404-6226, 28 March 2008 at [37].

Fair Trading Act

[62] Melco's application refers to the Fair Trading Act 1986 but no submissions were advanced in relation to it. There can be no suggestion that Melco was misled by Mr Hall into believing that an extension of cl 19 had or would be granted.

[63] When the request for an extension was first made on 24 December 2019, Mr Hall said he would take advice from his solicitor. He also advised Ms Isaacs this was his intention on 7 January 2020. Melco was aware no extension was granted because its lawyer sought a response to its request on two occasions on 9 January 2020. In the absence of a response, Melco must have known its options were to waive the condition or do nothing and risk cancellation of the agreement.

Conclusions

[64] I accept that Mr Hall was obliged to give Melco reasonable access to the property to conduct due diligence. Whether he breached that obligation by not providing access on 8 January 2020 is a matter I cannot resolve on this application.

[65] Melco has failed to satisfy me it is arguable its failure to fulfil the condition was caused by any default by Mr Hall. There is no satisfactory evidence that Melco could have satisfied cl 19 before it expired or that it would have waived the condition.

[66] Mr Hall had no obligation to advise Melco he had decided not to grant an extension. Melco's decision to not waive the condition was not caused by any default of Mr Hall either.

[67] As cl 19 was neither satisfied nor waived Mr Hall was entitled to cancel the agreement and he did so when written notice was given to Melco's solicitor at 5.03 pm on 9 January 2020.

[68] Melco's equitable interest in the property as purchaser under the agreement did not survive the cancellation of the agreement.

Result

[69] This application is dismissed. I order that the caveat at issue in this proceeding does lapse.

[70] I am not aware of any reason why costs should not follow the event. However, in case there are matters relevant to that matter, I reserve costs and counsel are to confer and attempt to reach agreement on costs. If agreement cannot be reached counsel may file memoranda within 14 days and I will determine the issue on the papers.

_____

O G Paulsen
Associate Judge

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